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No. 95-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

Morley D. Elton and David D. Dabbs,
Petitioners,
vs.
United States of America,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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February 5, 1996

QUESTION PRESENTED

Whether the Eighth Circuit erred on an important question of federal law by affirming the district court's assessment of a two-point enhancement for sophisticated means within the United States Sentencing Guidelines and federal tax law.

PARTIES

The parties named in the caption are the only parties to the Eighth Circuit judgment sought to be reviewed in this petition.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES ii

TABLE OF AUTHORITIES . . . . . v-vii

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 2

JURISDICTION 3

STATUTES AND REGULATIONS INVOLVED 3

§7201. Attempt to evade or defeat tax 3

§2T1.1. Tax Evasion 4

STATEMENT OF THE CASE 6

Nature of the Case 6

Facts Material to the Question Presented 7

REASONS FOR THE ALLOWANCE OF THE WRIT . . 13

ARGUMENT 13

I. Introduction 13

TABLE OF CONTENTS (continued)

II. The district court erred in finding the use of sophisticated means and the Eighth Circuit incorrectly affirmed because the conduct of petitioners does not amount to sophisticated means under the case law and commentary to the guidelines 14

A. Standard of Review 14

B. Argument 15

III. The district court erred in assessing and the Court of Appeals erred in affirming a 2 point enhancement for use of sophisticated means under the sentencing guidelines against petitioners because it applied the wrong legal standard in determining whether the enhancement under the guidelines applied 24

A. Standard of Review 24

B. Argument 25

CONCLUSION 27

TABLE OF AUTHORITIES

Pages

Statutes and Rules

28 U.S.C. §1254(1) 3, 6

28 U.S.C. §994 6

26 U.S.C. §7201. . . . . 3, 6, 15-17

12 U.S.C. §1828 19

18 U.S.C. §3661 6

18 U.S.C. §3143 . . . . . 6, 13

18 U.S.C. §3742(e) 14

U.S.S.G. §2T1.1 . . . . . 4-6, 10, 15, 25

U.S.S.G. §5B1.1(a)(2) 13

U.S.S.G. §5C1.1(c)(2) 13

Supreme Court Rule 10.1(c) 13

12 C.F.R. §329.2 19

TABLE OF AUTHORITIES (continued)

Cases

Alexander v. Nat'l Farmers Org., 687 F.2d 1173 (8th Cir. 1982) 15

Anderson v. City of Bessemer City, N.C., 105 S.Ct. 1504 (1985) 14-15

Griffin v. Omaha, 785 F.2d 620 (8th Cir. 1986) 15

Johnson v. Arkansas State Police, 10 F.3d 547 (8th Cir. 1993) 15

Koon v. United States, 116 S.Ct. 39 14

Melendez v. United States, 116 S.Ct. 417 (1995) 14

United States v. Armstrong, 116 S.Ct. 377 (1995) . . . 14

United States v. Becker, 965 F.2d 383 (7th Cir. 1992) 22

U.S. v. Charroux, 3 F.3d 827 (5th Cir. 1993) 22

United States v. Jagim, 987 F.2d 1032 (8th Cir. 1992) 20-21

United States v. Johnson, 43 F.3d 1211 (8th Cir. 1995) 13

TABLE OF AUTHORITIES (continued)

United States v. Kaufman, 800 F.Supp. 648
(N.D.Ind. 1992) 23-24, 26

United States v. Pierce, 17 F.3d 146
(6th Cir. 1994) 21-22, 27

United States v. Rice, 52 F.3d 843
(10th Cir. 1995) 25-26

United States v. Stokes, 998 F.2d 279
(5th Cir. 1993) 23

United States v. United States Gypsum Co.,
383 U.S. 364 , 68 S.Ct. 525 (1948) 15

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Petitioners Morley D. Elton ("Elton") and David D. Dabbs ("Dabbs") hereby request that this Court issue a writ of certiorari to review a judgment of the United States Court of Appeals for the Eighth Circuit entered November 7, 1995, which was the subject of an order denying suggestion for rehearing en banc and a petition for rehearing on December 20, 1995.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Eighth Circuit is reprinted as App. at A-1 - A-5 of this petition. It was filed on November 7, 1995. The Eighth Circuit's unpublished order denying petition for rehearing and suggestion for rehearing en banc was filed December 20, 1995 and is reprinted herein as App. at A-50.

Petitioners were sentenced in the United States District Court for the Eastern District of Missouri on May 19, 1995. Pertinent portions of the transcript containing the district court's findings and conclusions are reprinted herein as App. at A-6 - A-46.

JURISDICTION

The judgment of the Eighth Circuit in this action was entered on November 7, 1995. The Eighth Circuit's order denying petition for rehearing and suggestion for rehearing en banc was filed December 20, 1995.

The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1254(1).

The United States District Court for the Eastern District of Missouri had jurisdiction over this case in the first instance pursuant to 26 U.S.C. §7201.

STATUTES AND REGULATIONS INVOLVED

Both petitioners were convicted of one count each on their pleas of guilty to violation of 26 U.S.C. §7201, which provides in full as follows:

> **§7201. Attempt to evade or defeat tax**
>
> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

(Aug. 16, 1954, c. 736, 68A Stat. 851; Sept. 3, 1982, Pub.L. 97-248, Title III, §329(a), 96 Stat. 618.)

Section 2T1.1 of the United States Sentencing Guidelines for the year 1989 was at issue on appeal and is at issue in the instant petition. That section provides in full as follows:

§2T1.1. Tax Evasion

(a) Base Offense Level: Level from §2T4.1 (Tax Table) corresponding to the tax loss.

For purposes of this guideline, the "tax loss" is the greater of: (A) the total amount of tax that the taxpayer evaded or attempted to evade; and (B) the "tax loss" defined in §2T1.3.

(b) Specific Offense Characteristics

(1) If the defendant failed to report or to correctly identify the source of income exceeding $10,000 in any year from criminal activity, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

(2) If sophisticated means were used to impede discovery of the nature or extent of the offense, increase by 2 levels.

Application note 6 to the Sentencing Guidelines commentary for §2T1.1 is also at issue. It provides in full as follows:

> 6. "Sophisticated means," as used in §2T1.1(b)(2), includes conduct that is more complex or demonstrates greater intricacy or planning than a routine tax-evasion case. An enhancement would be applied for example, where the defendant used offshore bank accounts, or transactions through corporate shells.

Please see also, background commentary to note 6 of United States Sentencing Guideline §2T1.1, which provides as follows:

> Although tax evasion always involves some planning, unusually sophisticated efforts to conceal the evasion decrease the likelihood of detection and therefore warrant an additional sanction for deterrence purposes. Analyses of data for other frauds and property crimes show that careful planning or sophistication generally results in an average increase of at least 2 levels.

STATEMENT OF THE CASE

Nature of the Case

This petition concerns a sentencing after petitioners Elton and Dabbs each pleaded guilty to a single count of an information charging tax evasion in violation of 26 U.S.C. §7201. The discrete issue involves the district court's application of the United States Sentencing Guidelines (U.S.S.G.) promulgated pursuant to the Sentencing Reform Act (SRA) of 1984, 28 U.S.C. §994 et seq. and 18 U.S.C. 3661 et seq. At issue on appeal and in this petition is the district court's application of U.S.S.G. §2T1.1(b)(2) in finding and concluding that sophisticated means were used to impede the discovery of the nature or extent of the offense of tax evasion in this case. In so finding, the district court increased the total offense level for each petitioner from 9 points to 11 points, and entered judgment and commitment orders on May 19, 1995 sentencing each to a term of 10 months imprisonment, supervised release for 2 years following release from imprisonment, and fines of $4,000.00 as well as $22,480.50 for the cost of incarceration and supervision.

The district court then granted the motion of Elton and Dabbs for release pending appeal under 18 U.S.C. §3143(b) on June 2, 1995. (App. at A-47 - A-49)

Elton and Dabbs timely appealed to the Eighth Circuit, which summarily affirmed the sentences on November 7, 1995. (App. at A-1 - A-5) After denying petitioners' motion for rehearing and suggestion for rehearing en banc on December 20, 1995 (App. at A-50), the Eighth Circuit granted petitioners' motion to stay the

mandate pending this petition for certiorari. (App. at A-51 - A-52)

Facts Material to the Question Presented

Petitioners Elton and Dabbs operated a company known as Plant Facilities & Engineering, Inc. ("PF&E"). PF&E's business was to manage and decommission facilities for the Department of Defense. As part of its operations, PF&E disposed of property formerly owned by the Government which had been scrapped and/or abandoned by the Government.

During decommissioning of the St. Louis Army Ammunition Plant, a Department of Defense facility located in St. Louis, Missouri, PF&E took possession and sold to various scrap dealers and other parties the equipment and scrap. PF&E deposited the proceeds from the sales into an account at Commerce Bank in St. Louis County, Missouri controlled by petitioners Elton and Dabbs and William Goulding ("Goulding"). At the time, Goulding, now deceased, was a one-third owner of PF&E with Elton and Dabbs. The bulk of the deposited funds which are at issue in this case were the result of sales in and after May of 1989, and which were not reported on the tax returns of petitioners Elton and Dabbs.

After an investigation and negotiations with the office of the United States Attorney, Eastern District of Missouri, Elton and Dabbs entered pleas to an information whereby each of them plead guilty to willfully attempting to evade and defeat part of the income tax due and owing for the calendar year 1989 and filing false and fraudulent federal tax returns on or about April 15, 1990. As part of the pleas, petitioners Elton and Dabbs entered a stipulation

of facts relative to sentencing with the Government in which, *inter alia*, all parties agreed that the petitioners have accepted responsibility for their conduct.

The Probation Department then conducted presentence investigations of petitioners Elton and Dabbs. In the Presentence Investigation Reports ("PSRs"), both petitioners were found to have accepted responsibility for their actions; to have provided truthful admissions and having amended their tax returns; and to have voluntarily paid restitution prior to the adjudication of guilt. The PSRs also noted that there was no information suggesting that either petitioner impeded or obstructed justice. No objections were made to these portions of the PSRs by the Government, and the Court accepted them as part of its findings for the purposes of sentencing. (Sentencing Tr., pp. 35-36, App. at A-42 - A-46)

As to the computation of offense level, the PSRs employed the 1989 edition of the United States Sentencing Guidelines Manual. The PSRs then stated a base offense level of 11, and recommended increases of 2 points for failure to correctly identify the source of income exceeding $10,000 from criminal activity, and a further increase of 2 points for the use of sophisticated means. The PSRs then recommended a 2 level downward adjustment for the acceptance of responsibility and arrived at a recommended total offense level of 13 for both Elton and Dabbs. The issue of a 2 point enhancement for other criminal conduct was resolved at sentencing in petitioners' favor and is not part of this appeal.

On the issue of the alleged use of sophisticated means to impede the discovery of the existence or extent of the offense of tax evasion, the PSRs argued that the

proceeds from the sales of scrap and equipment in question were not, with a few exceptions, entered on the books and records of PF&E, and that the funds were deposited into "a secret/hidden corporate bank account at Commerce Bank (the Commerce Bank project account) in St. Louis." Petitioners strenuously objected to this conclusion. Both petitioners contended that, although the crime itself requires some evasion, to which they freely admitted, there was no advance "scheme" in place concerning the scale of scrap as implied by paragraph 6 of the PSRs, and the accounts were known within the office of PF&E and were not secret.

Prior to the evidentiary hearing on sentencing, the Government and all defendants entered further stipulations, obviating the need for live testimony at the hearing. With regard to the issue of sophisticated means, the parties stipulated as follows:

a) The tax evasion at issue in this case involved the use of an account at Commerce Bank in St. Louis County.

b) The account was a checking account opened by Plant Facilities employees in the name of PF&E, using its federal i.d. number.

c) The account was not an interest bearing checking account. It was not the only non-interest bearing account of PF&E, although at times it had an average balance in excess of $200,000.

d) The Commerce Bank account was not listed on the company's general ledger, although other

books and records of the company reflected the account and its balance.

e) Withdrawals from the account were made by the drafting of checks to principals of PF&E, who then cashed the checks.

The parties also stipulated to the admission of affidavits of former PF&E office managers, Jody Penn and Adora Elliott. These witnesses testified and offered uncontradicted evidence that the Commerce Bank account was not secret, was obviously local, was opened in PF&E's name and used PF&E's federal i.d. number.

At the sentencing hearing on May 19, 1995, the parties, *inter alia*, argued the issue of sophisticated means according to the evidence that had been presented. (Sentencing Tr., pp. 11-30, App. at A-8 - A-38) The Court then entered its findings and concluded that the 2 point enhancement for the use of sophisticated means should apply. (Sentencing Tr., pp. 30-35, App. at A-37 - A-45)

At the sentencing hearing, all the parties and the Court discussed the determination of the use of sophisticated means as set out in Application Note 6 to the Sentencing Guidelines §2T1.1(b)(2). This note defines sophisticated means as "conduct that is more complex or demonstrates greater intricacy or planning than a routine tax-evasion case. . . and stating further that the "enhancement would be applied for example, where the defendant used offshore bank accounts, or transactions through corporate shells." Id. The Government argued primarily that sophisticated means was demonstrated because the Commerce Bank account was non-interest bearing and, while it was stipulated that other PF&E

accounts were non-interest bearing, that the Commerce account at one time had an average balance exceeding $200,000.00 (conceded by petitioners). The Government also noted that the petitioners cashed the checks written to them and that the account was not kept on the general ledger of the company. (Sentencing Tr., pp. 11-15, App. at A-8 - A-16)[1] The petitioners argued that the fact that the Commerce Bank account was non-interest bearing was not indicative of anything, as 4 of 11 of the PF&E's accounts were non-interest bearing (the others including money market funds and the like); that at the time the account was opened the petitioners did not know what amounts any scrap or equipment sales would bring; that the information about the account was in fact on the books and records of PF&E though not on its general ledger because it was separate from the general plant decommissioning business of the company; and that the account was in a local bank in the name of the company, using its federal i.d. number. The petitioners argued further that, since the nature of the offense pleaded to was "evasion", under the applicable guidelines quoted above the facts indicated far less than an

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[1] During its argument, the Government also noted that withdrawals from the Commerce account were made through the use of checks made payable to PF&E principals Dabbs, Elton and Goulding, allegedly showing an effort to hide the distributions. The Court noted, however, that those checks would themselves be a paper trail. (Sentencing Tr. at p. 13, App. A-11 - A-13). Thus, the petitioners argued that <u>if</u> the issuance of the checks showed an intent to employ sophisticated means, the principals would probably have never deposited the money into the Commerce Bank account in the first place, because in the usual course of their trade scrap metal sales were often paid in cash. (Sentencing Tr. at p. 24, App. A-27 - A-29).

evasion which could be called more than routine or be compared to the use of dummy corporations or offshore bank accounts. (Sentencing Tr., pp. 15-30, App. at A-14 - A-38)

The district court noted difficulty with the sophisticated means provision of the sentencing guidelines stating "that some of these so-called sophistication schemes are not very bright, so the word 'sophistication' may be the thing that's wrong with the guidelines." (Sentencing Tr. at p. 25, App. at A-28 - A-31) The Court stated further that the two examples used by the guidelines to define the term "sophisticated means" were "almost extremes", stating further, "you don't have to go through the Cayman Islands to get 2 points in this courtroom." (Sentencing Tr. at p. 16, App. at A-15 - A-18) The petitioners stated that the guidelines use examples only, and that none of the conduct in this case rose to a level like those examples. (Sentencing Tr. at pp. 16-30, App. at A-15 - A-38)

In making its findings and concluding that the 2 point enhancement should apply, the Court stated that it would look to see if there was anything more than an individual simply lying on an IRS Form 1040. The Court then stated that the fact that the account was a non-interest bearing account did not make any sense once the account reached $200,000.00, and that the absence of entries on the general ledger was improper whether or not the company was performing a new section of its business. The Court concluded that a finding of "sophistication" need not require that a defendant employ a good or a "bright" system. (Sentencing Tr., pp. 30-35, App. at A-35 - A-45)

The Court then ordered the 2 point enhancement for sophisticated means, finding the total offense level to be 11 and, *inter alia*, that the months of imprisonment would range from 8 to 14. (Sentencing Tr. at p. 36, App. at A-45 - A-46) Petitioners Elton and Dabbs were then sentenced to 10 months in prison, 2 years supervised release, and fines of $4,000.00 plus $22,480.50 to be paid toward the cost of incarceration and supervision.[2] On June 2, 1995, the district court granted the motion of petitioners Elton and Dabbs for release pending appeal in accordance with 18 U.S.C. §3143(b). (App. at A-47 - A-49).

REASONS FOR THE ALLOWANCE OF THE WRIT

ARGUMENT

I. Introduction

Petitioner's bring this petition under Supreme Court Rule 10.1(c) to urge this Court to correct a mistaken

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[2] Under the applicable 1989 Sentencing Guidelines, the defendants were eligible for a sentence of 8 to 14 months at an offense level of 11. The district court sentenced them to 10 months. If the defendants had been found to be at an offense level of 9, as they argued, the sentencing table provided for a 4 to 10 month sentence and would have also made them eligible for conditional probation under U.S.S.G. §§5B1.1(a)(2) and 5C1.1(c)(2). The fact that a sentence of 10 months is possible under both offense levels 9 and 11 does not, however, make the sentences in the instant case unreviewable, because it is not clear that the sentencing court would have imposed the same sentence had it concluded that the offense level was 9. United States v. Johnson, 43 F.3d 1211, 1213-1214 (8th Cir. 1995).

reading of the Federal Sentencing Guidelines by the Eighth Circuit.[3] In doing so, it is critical that this Court form a baseline of conduct constituting sophisticated means under the sentencing guidelines applicable to tax cases to settle considerable confusion developing among the circuits. Review of the Eighth Circuit decision in this case is necessary because it incorrectly failed to find the district court's application of facts to the sophisticated means standard to be erroneous, and it, in effect, sanctioned the use of an incorrect legal standard in the process.

II. The district court erred in finding the use of sophisticated means and the Eighth Circuit incorrectly affirmed because the conduct of petitioners does not amount to sophisticated means under the case law and commentary to the guidelines.

A. Standard of Review.

Appellate review of a finding of the use of sophisticated means under the sentencing guidelines is subject to the clearly erroneous standard. 18 U.S.C. §3742(e). This Court has held that a finding is "'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Anderson v. City of Bessemer City, N.C., 105

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[3] This Court has recently indicated a readiness to settle sentencing guideline applications as to legal correctness. See, Melendez v. United States, cert. granted 116 S.Ct. 417 (1995); United States v. Armstrong, cert. granted 116 S.Ct. 377 (1995); Koon v. United States, cert. granted 116 S.Ct. 39 (1995).

S.Ct. 1504, 1511 (1985), quoting United States v. United States Gypsum Co., 383 U.S. 364, 395, 68 S.Ct. 525, 542 (1948). See also, Johnson v. Arkansas State Police, 10 F.3d 547, 552 (8th Cir. 1993)("in addition, a district court's findings are clearly erroneous if they 'fail to recognize [important] incidents and reject or fail to draw inferences which [the reviewing court] found inescapable from the record'" citing Griffin v. Omaha, 785 F.2d 620, 628 (8th Cir. 1986) "quoting Alexander v. Nat'l Farmers Org., 687 F.2d 1173, 1203 (8th Cir. 1982).

B. Argument.

It is fundamental in any tax evasion prosecution under 26 U.S.C. §7201 to prove that some evasive activity has taken place. That much, of course, was freely admitted in this case. To find, however, that "sophisticated means" were used to impede discovery of the nature or extent of the offense in accordance with U.S.S.G. §2T1.1(b)(2), something more than routine evasion must be present. Application note 6 to the applicable guidelines defines sophisticated means this way:

> "Sophisticated means," as used in §2T1.1(b)(2), includes conduct that is more complex or demonstrates greater intricacy or planning than a routine tax-evasion case. An enhancement would be applied for example, where the defendant used offshore bank accounts, or transactions through corporate shells.

U.S.S.G. §2T1.1, Application Note 6 (1989). Moreover, the Background to the Commentary on the Guidelines provide in pertinent part that "[a]lthough tax offenses always involve some planning, unusually sophisticated efforts to conceal the offense decrease the likelihood of detection and therefore warrant an additional sanction for deterrent purposes." (emphasis supplied) U.S.S.G. §2T1.1, Commentary (1989).

In pleading to tax evasion under §7201, Elton and Dabbs obviously admitted that tax evasion has occurred. The issue, however, in view of the guidelines and commentary is whether additional means, of a sophisticated nature, above and beyond a routine tax evasion case were used to impede the investigation.

In this case, the undisputed facts showed a distinctly unsophisticated tax evasion, particularly in view of the existing case law as set out below. The evidence, including stipulations, affidavits and even the Probation Department's own PSRs demonstrate:

- The tax evasion was a result of a separate business entered into by PF&E to sell scrap and other material abandoned by the Government. Its funds were placed in a local bank account at Commerce Bank, opened in the name of the company, by its employees, using its own federal i.d. number. Much of the money deposited into the account was in currency received from scrap dealers which, in an even slightly more sophisticated scheme, much less an "unusually sophisticated effort," would likely never have been deposited at all.

- The Commerce Bank account was listed on some of the company's books and records, which reflected the account and its balance, although not on the general ledger.

- Withdrawals from the account were made by the drafting of checks to principals of Plant Facilities, who then cashed the checks, hence creating a paper trail.

- The funds and the account were generally not kept secret from anyone, except that they were not reported to the IRS, which simply constitutes the tax evasion at issue, not particularly any further sophisticated means.

In the case below, the Court, the Government and the petitioners all focused on the Commerce Bank account in determining whether the standards for use of sophisticated means were met. The Commerce Bank account does not constitute the use of sophisticated means. Although reporting to the IRS and payment of income tax was admittedly evaded (as fundamentally required under 26 U.S.C. §7201), sophisticated means like those envisioned by the guidelines were not used. And although the Court below stated that "you don't have to go through the Cayman Islands to get 2 points in this courtroom" (Sentencing Tr. at p. 16, App. at A-15 - A-17), the law plainly requires that something of a sophisticated level like use of offshore bank accounts or transactions through corporate shells be employed.

The account was known within the office, was opened and managed by PF&E bookkeepers and

principals. And far from being in the name of a dummy corporation or an offshore account, it was opened locally in the name of the company, complete with its own federal i.d. number. Records were kept separate from the other business of PF&E because it in fact was a separate business. And although it was in a non-interest bearing account, like some other PF&E accounts, and therefore did not generate IRS Form 1099's, there is no evidence that anyone knew or could have known when the account was open what kind of funds would be generated by the sale of scrap and abandoned equipment. The decision not to pay taxes which forms the basis of the guilty pleas below was made after the business was undertaken and the account was set up. It was simply not part of any pre-planned scheme, sophisticated or otherwise. If there had been such a scheme to be hidden through the use of sophisticated means, surely the petitioners would never have set up and managed the account the way they did. At a minimum, they would not have made cash deposits to the non-interest bearing account when they could have simply kept the cash.

Against this background, and statutory and sentencing guideline framework, the district court found and the court of appeals erroneously affirmed that, although the Commerce account was not PF&E's only non-interest bearing account, and although it was opened in the name of the company at a local bank with the firm's federal i.d. number, and although funds for the sale of scrap and abandoned equipment were processed through the company, albeit in a limited way (Sentencing Tr. at p. 31, App. at A-37 - A-39), no "businessmen who are substantial people and have made a lot of money would let $200,000.00 sit around and not draw interest." The Court found further that the account was not placed on the

general ledger, and that Form 1099's were not generated with respect to the Commerce account.[4] (Sentencing Tr., pp. 32-33, App. at A-38 - A-42) Based on these slim findings, the Court then concluded that the sophisticated means enhancement should apply. Nothing, however, shows from the entire record of this case that any of petitioners' conduct exceeded what should be viewed as a routine tax evasion case.

The district court grappled with the point that the tax evasion at issue probably did not seem very sophisticated by stating that sophistication schemes in some cases are "not very bright" and stated further that the "word 'sophistication' may be the thing that's wrong with the guidelines." (emphasis added). (Sentencing Tr. at p. 25, App. at A-28 - A-31) Petitioners recognize that neither the Supreme Court nor the Circuit Courts of Appeal have precisely defined the term sophistication in this context. When viewed in terms of existing case law (as shown below) and the commentary to the guidelines, however, it is clear that the term sophistication requires a considerably higher level of conduct than was present in this case. Moreover, even dictionary definitions of the word "sophisticated" shed light on the problem and, although they do not use the term "bright", they come very close. See, e.g., Webster's, defining sophisticated, *inter alia* as "deprived of a native or original simplicity", "highly complicated, many sided . . . intellectually appealing". (emphasis added). `Webster's Third New International Dictionary, unabridged, p. 2174 (Merriam-Webster Co.,

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[4] By law, the type of corporate checking account in question was barred from paying interest. See, 12 U.S.C. §1828(g)(1) and 12 C.F.R. §329.2.

1961); see also, The American Heritage definition for sophisticated, describing it *inter alia* as "having acquired worldly knowledge or refinement; lacking natural simplicity or naivete; very complex or complicated. The American Heritage Dictionary, Second College Edition, p. 1166 (Houghton Mifflin Co. 1985). Thus, the district court rejected even the plain meaning of the term sophisticated in reaching its result, and the appellate court was wrong to affirm.

A view of other judicial applications of the sophisticated means standards reveals further that the district court's application of the enhancement in this case was clearly erroneous. Courts that have applied the enhancement, or affirmed the application of the enhancement, show findings far different from those reasonably present in this case. Moreover, cases in which courts have declined to find sophisticated means have done so in circumstances showing far higher levels of evasive behavior than is present in our case.

In United States v. Jagim, 987 F.2d 1032 (8th Cir. 1992), for example, the Eighth Circuit examined a complicated tax shelter scheme which was set up using falsified documents and limited partnerships involving a cattle breeding operation. The scheme was engineered by a disbarred lawyer and former certified public accountant. During the operation of the scheme to sell fraudulent tax shelters, documents were both falsified and backdated. The entire "scam" was then marketed to outside investors. United States v. Jagim, supra, at 1036. There, as the district court noted in this case, the Court found that the scheme "was not a case where an individual taxpayer completed his individual 1040 form with false information", and determined that more sophisticated conduct had

occurred. This Court also noted, however, that in order to find sophisticated means, the scheme must be shown to have been more elaborate or carefully planned then a typical tax evasion case. Id. at 1041-1042. The question, of course, is how much more than a routine case of evasion must be shown, assuming no further definition of "sophisticated" than is commonly understood. Even a cursory examination of the conduct found in Jagim shows that this circuit requires far more sophisticated misconduct to conclude that the enhancement should apply.

Other circuits reach the same result. In United States v. Pierce, 17 F.3d 146 (6th Cir. 1994), for example, the Sixth Circuit found not clearly erroneous a 2 point enhancement under facts strikingly dissimilar to ours. There, the defendant used a complicated scheme which included the following conduct:

- The defendant went to his employer with false information, including presenting an inapplicable IRS publication dealing with non-resident aliens in order to exempt himself from withholding.

- The defendant used several mailing addresses from different IRS regional service centers to impede discovery by the IRS.

- The defendant changed his excessive number of withholding deductions in accordance with changes in IRS regulations in order not to alert the IRS.

- The defendant directed his wife to file misleading returns.

United States v. Pierce, supra, at 151. Our facts are dramatically different from those in Pierce. Ours is a case where the two petitioners had a legitimate business which generated income that was placed in a bank account and later not declared to the IRS. When the investigation was undertaken, they promptly filed amended returns, accepted responsibility for their conduct, assisted in further investigations of others and discontinued the entire business. It was indisputably a case of tax evasion, but also indisputably not a case involving the use of sophisticated means as contemplated by the guidelines or applicable case law. See also, U.S. v. Charroux, 3 F.3d 827, 837 (5th Cir. 1993)(where the Fifth Circuit found not clearly erroneous an enhancement for sophisticated means where the petitioners structured elaborate, bogus transactions to hide their revenues known as "land flips", which were themselves found to be fraudulent, and "sought the advice of various tax professionals in order to lend the appearance of legitimacy to their dealings, while withholding from those professionals the information which would have permitted them to determine correctly the taxability of the land flip revenues"); United States v. Becker, 965 F.2d 383, 385 (7th Cir. 1992)(enhancement found not clearly erroneous where the defendant developed a complicated scheme involving secret "warehouse bank" accounts identified not by name but only by an arbitrary number, and persistently moved funds in and out of different accounts, including out-of-state accounts, to avoid detection).

In another recent decision, the Fifth Circuit reversed a district court's finding of enhancement for sophisticated

means because there existed another explanation for the petitioners' conduct other than an effort to deceive the IRS and impede its investigation in a sophisticated manner. In United States v. Stokes, 998 F.2d 279 (5th Cir. 1993), the defendant had embezzled money from her employer, had hidden it and had taken steps to make sure her accountant did not find out. In concluding that the trial court had misinterpreted the guidelines in ordering a 2 level increase for sophisticated means, the Fifth Circuit found that the conduct could reasonably be explained by the defendant's effort to hide the embezzlement itself and, significantly, stated "there is nothing sophisticated about simply not disclosing income to your accountant". United States v. Stokes, supra, 998 F.2d at 282. Here, too, there is another reasonable explanation for petitioners' conduct, other than the obvious point that none of their conduct was very sophisticated. That is, when the account was opened as a non-interest bearing account, neither petitioner knew what revenues would be generated (and there is no evidence of record to suggest that they did), and the money was deposited to the account because the business was simply separate from their ongoing business of managing plants and plant decommissioning.

In another recent district court case, United States v. Kaufman, 800 F.Supp. 648, 654-656 (N.D.Ind. 1992), the trial court examined facts far more sophisticated than our own and still found that sophisticated means under the guidelines were not employed, even though use of a special skill requiring a separate enhancement (where the defendant was a CPA) was found. In Kaufman, the defendant engineered a complicated skimming scheme from his own CPA firm, set up a dummy deposit ticket system the Government argued was a second set of books, and created false write offs from the firm's accounts. There

the court noted that for tax evasion to be present in the first place, some scheme must be present, but that the test is whether the scheme was "more complex or demonstrated greater intricacy or planning than a routine tax evasion case". United States v. Kaufman, supra, at 655. There the court found that the conduct described above was not sophisticated enough to allow enhancement under the guidelines. Id. at 656. There, however, the conduct was far more sophisticated than that which appears in our record and is persuasive in showing that the finding of the use of sophisticated means in our case was clearly erroneous.

In our case, it is clear that the district court rejected the spirit and terms of the guidelines, rejected the applicable case law, and even rejected the plain meaning of the word "sophisticated". In doing so, the district court reached a clearly erroneous result and should have been reversed by the Eighth Circuit.

III. The district court erred in assessing and the Court of Appeals erred in affirming a 2 point enhancement for use of sophisticated means under the sentencing guidelines against petitioners because it applied the wrong legal standard in determining whether the enhancement under the guidelines applied.

A. Standard of Review.

Petitioners contend that the court applied a standard used elsewhere in the sentencing guidelines for "more than minimal planning" as its legal interpretation of the issues in this case rather than the proper definition of "sophisticated means", as explained in U.S.S.G. Application Note 6. As

such, appellate review of a district court's legal interpretation of the sentencing guidelines should be de novo. See, United States v. Rice, 52 F.3d 843, 848 (10th Cir. 1995).

B. Argument

As shown above, as well as in the district court's interpretation and the Eighth Circuit's affirmance of the sentencing guidelines applicable to use of sophisticated means, the court clearly believed that any conduct in excess of simply lying on an IRS Form 1040 could constitute use of sophisticated means. In effect, the court determined that any conduct demonstrating more than minimal planning would subject the petitioners to the 2 point increase.

Sentencing guideline provisions in effect prior to the publication of the 1989 guidelines at issue in this case allowed for such a legal application. Prior to that time, the commentary noted that whether sophisticated means were employed under §2T1.1(b)(2) required a subjective determination similar to that called for under "more than minimal planning" in §2F1.1(b)(2). Using the legal standard for "more than minimal planning" interchangeably with sophisticated means shows a much lower degree of evasive conduct required. The commentary to "more than minimal planning" suggested that it meant any more planning than is typical for commission of the offense "in a simple form". The commentary to §1B1.1 also states that "more than minimal planning" is deemed present in any case involving repeated acts over a period of time, unless it is clear that each instance was purely opportune.

Since 1989, however, the guidance comparing "sophisticated means" to the lesser standard of "more than minimal planning" was changed and replaced with the current guidance which requires higher levels of evasion than the routine case and conduct like the use of dummy corporations and offshore accounts. See, Sentencing Guidelines U.S.S.G. §2T1.1(b)(2), Application Note 6. Consequently, in United States v. Rice, 52 F.3d 843 (10th Cir. 1995), the Tenth Circuit examined a scheme where a CPA perpetrated a complicated scheme of tax frauds involving several subchapter S corporations established to create false withholdings. There the court concluded that, in comparison with the decided cases, the tax evasion scheme was not sophisticated, and reversed the district court, although it affirmed a finding of more than minimal planning for the same conduct.

Similarly, in U.S. v. Kaufman, supra, 800 F.Supp. 648, 655, the district court concluded that the conduct in question did not amount to "sophisticated means" but that it may have supported a finding of more than minimal planning under the guidelines then (in 1992) applicable to other crimes.

In our case, it appears clear that the district court employed a lesser standard than required under the applicable guidelines to reach its conclusion that sophisticated means were used and, in fact, employed the "more than minimal planning standard". This was legal error and should have been reversed by the Eighth Circuit.

CONCLUSION

The critical problem in this case, and the issue requiring Supreme Court review, is that courts like the ones in this case are abandoning the legal requirements and standards for review in the application of the sophisticated means enhancement under the sentencing guidelines. Courts are applying the enhancement erroneously to any conduct beyond a "simple lie on a 1040 Form" in reliance on the language from United States v. Pierce, supra, 17 F.2d 146 at 151 (6th Cir. 1994). This approach, however, ignores the fact that far more conduct then simply lying on a Form 1040 was evident in Pierce. Moreover, this approach fundamentally ignores the requirements of the sentencing guidelines, application notes and relevant background commentary. Moreover, the approach does violence to the plain dictionary meaning of sophistication, particularly in this case.

Respectfully
submitted,

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Dabbs
February 5, 1996

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 95-2414

United States of America, *
*
Appellee, *
*
v. *
*
Morley D. Elton *
*
Appellant. *

Appeals from the United States District Court for the Eastern District of Missouri

No. 95-2415

United States of America, * [UNPUBLISHED]
*
Appellee, *
*
v. *
*
David D. Dabbs, *
*
Appellant. *

Submitted: November 6, 1995
Filed: November 7, 1995

Before BOWMAN, BEAM, and MURPHY, Circuit Judges.

PER CURIAM.

Morley D. Elton and David D. Dabbs appeal the 10-month sentences imposed by the District Court[1] following their guilty pleas to tax evasion, in violation of 26 U.S.C. §7201 (1988). For reversal, defendants argue that the District Court erred in assessing a two-level enhancement for using a sophisticated means to impede discovery of the nature or extent of the tax evasion. We affirm.

The Guidelines mandate a two-level increase in a defendant's base offense level when the defendant uses sophisticated means to impede discovery of the nature or extent of the defendant's tax evasion. U.S.S.G. §2T1.1(b)(2) (1989). "Sophisticated means," as used in

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[1]The Honorable Edward L. Filippine, United States District Judge for the Eastern District of Missouri.

this section,

> includes conduct that is more complex or demonstrates greater intricacy or planning than a routine tax-evasion case. An enhancement would be applied for example, where the defendant used offshore bank accounts, or transactions through corporate shells.

Section 2T1.1, comment. (n.6) (1989). We "review the district court's findings of facts for clear error and its application of the guidelines to the facts de novo, giving due deference to the district court's application of the guidelines." United States v. Saknikent, 30 F.3d 1012, 1013 (8th Cir. 1994).

The record here shows that defendants' tax-evasion scheme involved the use of a non-interest-bearing checking account, which at times had an average balance exceeding $200,000. Although the account was set up under the name of defendants' company, the account was not listed on the company's general ledger and defendants made withdrawals by drafting checks to themselves, which they

then cashed. Because the account was non-interest bearing, no 1099 interest-reporting form was generated for filing with the Internal Revenue Service. Given these and other facts in the record, we conclude the District Court did not err in assessing the challenged sophisticated-means enhancement. See United States v. Pierce, 17 F.3d 146, 151 (6th Cir. 1994) (affirming §2T1.1(b)(2) enhancement where defendant's conduct went beyond "simply l[ying] on a 1040 form"); United States v. Jagim, 978 F.2d 1032, 1042 (8th Cir. 1992) (noting before §2T.1(b)(2) enhancement is appropriate scheme must be shown to be more than "routine tax-evasion case" where individual has falsified 1040 form in order to avoid paying federal taxes), cert. denied, 113 S.Ct. 2447 (1993).

Finally, we reject defendants' argument that the District Court used the wrong legal standard in determining whether the enhancement should be applied.

The judgment is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Cause No. 4:94CR256
Plaintiff,	)	
Vs.	)	St. Louis, Missouri
PLANT FACILITIES, and MORLEY D. ELTON, and DAVID D. DABBS,	)	
Defendants.	)	May 19, 1995

BEFORE THE HONORABLE EDWARD L. FILIPPINE
Transcript of Proceedings

Sentencing of Plant Facilities & Engineering, Inc., and Morley D. Elton, and David D. Dabbs

APPEARANCES:

For the Plaintiff:	James G. Martin OFFICE OF U.S. ATTORNEY 1114 Market Street, Room 401 St. Louis, Missouri 63101
For the Defendant Plant	Timothy F. Noelker

Facilities and Engineering Inc., and Morley Elton:	COBURN & CROFT One Mercantile Center Suite 2900 St. Louis, Missouri 63101
For the Defendant David D. Dabbs:	Leonard J. Frankel VINES AND FRANKEL 231 S. Bemiston, Suite 1111 Clayton, Missouri 63105

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FRIDAY MORNING, MAY 19, 1995

(In Court 2: Call to Order of the Court.)

THE COURT: All right. This is the United States of America, plaintiff, versus Plant Facilities and Engineering, Inc.; Morley D. Elton; and David D. Dabbs. This matter is here this morning for sentencing; it's Cause Number 4:94CR256.

The government is represented by James G. Martin, Assistant United States Attorney; Plant Facilities and

MR. NOELKER: Yes.

THE COURT: I understand that. He was given $55,000 – Mr. Humphreys was?

MR. NOELKER: Well, actually his company was. And we don't for a minute deny that –

THE COURT: What was he given that for?

MR. NOELKER: Because he aided in resale; he brought the buyer to this company. And we don't doubt for a minute that he's got severe criminal problems to which he pleaded guilty for his conduct.

THE COURT: I'm going to deny that objection and we'll just take the facts as they are presented.

Let me ask you this, Mr. Noelker, nothing in the facts are incorrect, you just don't agree with the conclusions?

MR. NOELKER: Correct.

THE COURT: All right. I will accept the facts for my consideration of the facts –

MR. NOELKER: Okay.

THE COURT: – whatever the conclusions; is that agreeable – and with that I'm going to deny the objection.

MR. NOELKER: Okay.

THE COURT: Is there anything else before we get back to the sophisticated means?

MR. NOELKER: No.

THE COURT: That's it. All right. Those will be all the rulings, with the exception of the sophisticated means, and, of course, I'm sure that all three counsel will want to be heard on that because that's the main item here that's still before the Court. And Mr. Martin, since you have the burden, although Mr. Noelker and Mr. Frankel are objecting to the recommendation, but I still think you have the burden, so do you want to proceed?

MR. MARTIN: Yeah, I don't disagree with that, Your Honor.

The facts are, as they are set out, the tax evasion

issue for the two individual defendants involves the use of the account at the Commerce Bank.

As stipulated by all the parties, that was a non-interest bearing account. And while it is also stipulated that they had other non-interest bearing accounts, this is the only account that came anywhere close to having an average balance of $200,000. That is tens of thousands of dollars of lost interest when you keep those sort of funds in a non-interest bearing account.

THE COURT: Over what period of time did it carry that kind of balance?

MR. MARTIN: A year, Your Honor; a year's time frame. So, it was a non-interest bearing account. Additionally, in their method of withdrawing from that account was done as stipulated, by writing checks to one of the two individual defendants and then their cashing those checks – in other words, avoiding any paper trail, never depositing those checks into their accounts, never

using those checks to pay for any bills.

THE COURT: How were those checks made payable?

MR. MARTIN: To one of the two individuals.

THE COURT: Personally?

MR. MARTIN: Personally.

THE COURT: And then they cashed them?

MR. MARTIN: And we're talking between one and $4,000 checks so there aren't CTRs created, but a huge sum of money to just be cashing checks for.

THE COURT: Where would they cash those checks? Would they cash them right there at the Commerce Bank, or do you know how they would cash the checks? They were not deposited in their own accounts, they were just cashed?

MR. MARTIN: Just cashed, correct.

THE COURT: Wouldn't that be a paper trail?

MR. MARTIN: Well, Your Honor, the reason it

doesn't create a paper trail is because if the IRS was investigating you for potential income tax evasion, they would look at your accounts. Of course, the first thing they look at is interest-bearing accounts, that's how they find out about them with 1099s.

So they take the first step of avoiding 1099s being generated by keeping these large sums of money in non-interest bearing accounts. Then they already know that the IRS is not looking at that account because there is no 1099 generated. So as long as they don't take that money and take a check and put it in one of their other accounts, the IRS, looking at their other accounts that they're aware of, would never be able to trace back to the Commerce account because no check is put into those other accounts.

The way the IRS finds new accounts is you look to see where other deposits came from, so avoiding ever depositing money and getting these large sums withdrawn only with cash, never using it to pay any bills or anything,

shows that they were taking an additional step to make sure they were not caught in hiding this money.

The third, and just as important a factor that has been stipulated to, is that this account was not kept on their general ledgers, their general ledger that would show their profit and loss for the company.

While they did have records of the account and, of course, they would, if they had the account at all, they would still have records of it, the fact that they kept it off their general ledger meant if anybody came and looked at their general ledger and looked at their income statements, they, again, would never find out about that account.

This is not someone who just earned income and then failed to disclose it. This is someone who took the steps of willing to lose interest payments by putting it in a non-interest bearing account, handling large sums of cash in order to avoid creating a paper trail, and keeping it off your general books and ledgers so it's not part of the

company's profit and loss. And, again, so that people –

THE COURT: Would that be reflected in any other accounting procedure of the company?

MR. MARTIN: There were monthly statements generated by the bookkeeper, Jody Penn, and given to the defendants so that they knew how much –

THE COURT: Was that given to Mr. Dabbs is that what I read here?

MR. MARTIN: Yes.

THE COURT: The affidavit says so.

MR. MARTIN: Correct. So that they knew –

THE COURT: Given to him personally?

MR. MARTIN: That way he would know how much money was in the account, but it was never kept in the general books that would tell you how much total cash and how much profit and how much loss the company may be experiencing. There are no debits or credits made in handling this account because that would generate another

paper trail for someone to find.

And it's our submission that this is clearly beyond the ordinary steps taken for someone evading taxes and thus entitles the additional two points for sophisticated means.

THE COURT: All right. Thank you very much. Who wishes to go first? The way it's listed on the indictment, it would be the corporation, Mr. Elton, Mr. Dabbs, in that order.

MR. NOELKER: Thanks, Your Honor. What we think the government has made out here is a case of routine tax evasion. Fundamentally, Judge, there must be some evasion in order to meet the level of criminal conduct required. We agree that that occurred and we agree and have entered guilty pleas to that effect.

What the guidelines envision for sophisticated means, first of all, they say what they envision is the use of offshore bank accounts or dummy corporations.

THE COURT: I'm not going to interrupt you again, but they gave two examples in the guidelines and I can guarantee you that in the multitude of cases that I have read, I have not found one with an offshore or a dummy -- but I have found they have done a few things and I can guarantee you that you don't have to go through the Cayman Islands to get two points in this courtroom.

MR. NOELKER: I understand.

THE COURT: So that's two examples that they use that are almost extremes, but the case law, and the cases that have been cited and you've all referenced, have been much different than the Cayman Islands or offshore, so let's proceed.

MR. NOELKER: I understand. The cases that we've cited, that both sides have argued to each other even prior to the briefing and this argument, show a level like offshore bank accounts.

THE COURT: All right.

MR. NOELKER: For example, in the Becker case, which the government argued to us at an earlier point in our discussions, in Becker we at least had out-of-state bank accounts and a so-called warehouse bank that were opened not using the company or the individual's name or any identifying numbers like a Social Security number or Corporate Tax ID number. Those accounts were done with an arbitrary number that would avoid detection.

And a quick note on the facts, we would dispute that all of the checks taken from this Commerce account were cashed. Our information is that at least Morley Elton deposited those checks into his accounts in Florida.

When we talk about interest-bearing accounts as well, Your Honor, the company -- and I've gone through these records myself -- the company at one point in the time, the time in question, had 11 bank accounts, four were non-interest bearing, seven were.

When this account was opened, there's no

evidence is that it was opened with $200,000. What happened was that these guys opened this account because they were doing this separate business of selling the abandoned equipment, and frankly they made a lot more money than thought they would, then made a decision not to pay taxes on it. That was a crime, that was evasion, and that's why they're here today. But it was not sophisticated means. And even though – we're not saying the government has to prove an offshore bank account or a dummy corporation, but it was not nearly the sophisticated level of the cases that we and the government have cited. The Kaufman case that we cited –

THE COURT: Let me ask you a question.

MR. NOELKER: Yes.

THE COURT: If I decided to do some business enterprise, and you're saying there's no evidence that I was doing anything illegal, but I had set up a Swiss bank account and then later on this thing really became

profitable, so I said, hey, why not just not pay taxes and I left it in the Swiss bank account, you're not telling me that because I later decided to do it that all of the means – the Court should not consider any of those other means like a Swiss bank account, because there's no evidence to show that before I opened that up –

MR. NOELKER: Well, first of all, Your Honor, I am saying –

THE COURT: – there was no intent; is that correct?

MR. NOELKER: I am saying there is no prior evidence here, but what I'm also saying is –

THE COURT: But I say once there would be a Swiss bank account or something like that –

MR. NOELKER: I think the Swiss bank account –

THE COURT: – the Court could then consider it, could it not?

MR. NOELKER: Yes, it could. The Swiss bank

account makes a difference. Look at our bank account. It's a Commerce Bank in St. Louis County. Whose name is it in? Ours. It had our tax ID number on it.

THE COURT: Which meant what?

MR. NOELKER: This was not anything near a --

THE COURT: Which meant what?

MR. NOELKER: It was detectable. If anyone looked at that account to see who had it and the money going in and out --

THE COURT: Well, it was in the name of the company, I notice.

MR. NOELKER: That's right.

THE COURT: But I'm saying it had the company's name and ID on it.

MR. NOELKER: That's right.

THE COURT: I understand that.

MR. NOELKER: When the decision was made not to pay taxes happened, obviously after the account was

opened. The ledger, the general ledger of the company -- first of all,

that's not required to be submitted to the IRS anyway. But when the general ledger decision was made, that was Dave Dabbs and he's pleaded guilty to tax evasion. It was his doing to put the general ledger together. The bookkeepers in the company, which was not a highly sophisticated operation, the bookkeepers in the company kept track of what was going on, what was coming in, and forwarded that material to Dave.

Again, from my review of the government's information that it subpoenaed during this investigation, there are records there that show accounts and balances and they show the Commerce account and the balance in the Commerce account.

What happened was they made a decision to evade taxes, regrettable as that is, but they did it, they got caught, they pleaded guilty, but it was not more sophisticated than

any routine tax evasion case would be.

If we could look at the cases, just momentarily, the Pierce case, the most recent case cited by government, far from what we have in our situation, the Pierce case noted that there was false information given to the employer about possible IRS exceptions; fake addresses were given from different -- to deal with different IRS service centers; changes in individual deductions were manipulated; and the defendant there, who did not plead but went to trial, had directed his wife to file misleading returns. They weren't filing joint returns because he never filed any.

THE COURT: All right. I have read that, and I want you to make your point, but if you look up a little bit at the top of the paragraph, where did they start from? What is the ordinary case as opposed to measuring sophistication? What do they say? They say this was not the case, the ordinary case I'm now citing, this was not a case of an individual who simply lied --

MR. NOELKER: That's correct.

THE COURT: – on his 1040 form. They did more than that.

MR. NOELKER: Let's look at Kaufman then, Your Honor.

THE COURT: The courts start with somebody puts down at the bottom, you know, I gave 5,000 to charity when they gave none, or I made this amount of money when they made twice that, that's what they say is the simple – and if it gets beyond that, then we get into the word "sophistication," but believe me some of these don't look very sophisticated, and this one doesn't even look very sophisticated. I'd simply go into my employer and say I've got less dependents. People change their W4s without – the W4s sometimes are adjusted upwards so they don't have to pay or they pay more withholding so they don't have to pay at the end of the year, that kind of thing. So that wasn't very sophisticated. He told his wife to lie –

what's so sophisticated about that -- on the form?

MR. NOELKER: In fact, Judge, in our case, we have the opposite. If Jody Penn were her, she'd tell you. They told her we're hiding this from the IRS. She didn't lie.

THE COURT: Is it more sophisticated to say lie or you lied?

MR. NOELKER: No. Judge, we're far closer to the beginning of that paragraph here. This case involves people who did not --

THE COURT: That's what this Court has to do is measure how close you are.

MR. NOELKER: Right.

THE COURT: And how far away. The Cayman Islands, we have no problem.

MR. NOELKER: Okay.

THE COURT: I grant you that.

MR. NOELKER: What I'd encourage you to look at then, Your Honor, is the Kaufman case that we cited where

the court, actually the court of appeals, found -- determined no sophisticated means when what we had was a CPA -- the scheme there is a little better explained than in Becker. But there it was a CPA skimming money from his own CPA firm and not paying taxes on it. He developed a very intricate scheme of putting Post-It Notes on bills that looked like they were to have money delivered to the firm and had the money delivered to him personally, then generated fake deposit slips and writeoffs from the company's accounts receivable in order not have the people dunned twice.

THE COURT: What court was that?

MR. NOELKER: That was the Northern District of Indiana, 1992.

THE COURT: District Court?

MR. NOELKER: Yes, Your Honor. In any event, the Kaufman case shows -- it's the best example we found that shows means, but not sophisticated means.

THE COURT: Mr. Noelker, it shows that that judge

felt that sophistication was the Cayman Islands. That case was a lot more sophisticated than some of these appellate decisions, am I wrong on that? I mean, the facts of that case appear to be more sophisticated than some of the cases –

MR. NOELKER: Than Jagim, for example?

THE COURT: The courts of appeal affirmed sophistication.

MR. NOELKER: Your Honor, I do not agree that those facts are more sophisticated. I do think, though, in any event, it does show that our tax evasion was pretty unsophisticated.

In fact, one other fact that comes out – it was noted in the presentence reports and we didn't object to it – a lot of the money from these scrap dealers comes in, in cash. It's the nature –

THE COURT: Say that again.

MR. NOELKER: A lot of the money from these

scrap dealers comes in, in cash.

THE COURT: Okay.

MR. NOELKER: They – in the trade, scrap dealers tend to write a lot of bad checks, they take cash in. But these guys were going to be so sophisticated and hide all this in a higher than routine evasion case, why would they ever deposit the cash in the bank in the first place, then write checks on it, then deposit the checks into a Florida account with their own personal names on them? It just would not have happened that way if this was a preordained sophisticated scheme the way the guidelines contemplate. I'm not saying the way the guidelines actually say, but the way they contemplate. We just would not be looking at facts like the ones we're looking at if they planned truly to make it a higher than routine evasion sophisticated scheme.

THE COURT: Mr. Frankel.

MR. FRANKEL: Very briefly, Your Honor. The PSI

points out that there was a third partner who is now deceased, Mr. Goulding (phonetic), and it's my understanding that there's evidence that he deposited checks which would indicate -- and he was also part of this scheme and that would, I think, negate this idea that failure to deposit some of the checks rises to the level of sophistication.

Obviously, if there were no tax evasion, we wouldn't be here, at least with the individuals in the first place in this case. So there is the basic tax evasion and they acknowledge that they participated in that and performed those acts.

It's also my belief that the United States Supreme Court has not yet ruled on what sophisticated means actually means, and the word "sophistication" has been, in appellate decisions, it seems to be all over the place as to what it is.

THE COURT: It does.

MR. FRANKEL: And I don't know that we have very good –

THE COURT: And I'll tell you that some of these so-called sophistication schemes are not very bright, so the word "sophistication" may be the thing that's wrong with the guidelines.

MR. FRANKEL: But clearly to have an enhancement over tax evasion, which is the gravamen of the offense, there has to be something other than what we would call "a routine tax evasion." And here there really is, in our view, nothing more than a failure to report income. And as Mr. Noelker has pointed out – I mean, they got cash. If their intent was not to have any paper trail of it, why put it in the bank in the first place? You don't do that if you're not going to create a paper trail and it obviously does that.

It is our view that this was a non-sophisticated circumstance that was contemplated by the authors of the

guidelines when they prepared the guidelines and set forth what the range of punishment should be on a normal routine tax evasion case.

THE COURT: Let me ask you this: This account that was set up, how long was that account set up? I've got the stipulations here. It says it was opened and it used a Federal ID number and there was never any taxes paid on any of the funds in that account.

MR. FRANKEL: There was never taxes paid on the funds --

THE COURT: How long was that account open?

MR. FRANKEL: Two to three years, Judge.

THE COURT: When was it first opened?

MR. NOELKER: December of '88, Your Honor.

MR. FRANKEL: One other point I'd like to make, I guess, is that I think part of the government's argument is that there is a -- that there is some kind of an understanding that the defendants would know exactly how

IRS goes about investigating a case, and because they didn't do everything that would make it easier for the IRS to investigate, that therefore it's sophisticated. And I don't think that that's what the law is either.

THE COURT: I can understand your point.

MR. FRANKEL: All right.

THE COURT: They may not know how the Internal Revenue does work.

MR. FRANKEL: That's correct.

THE COURT: I'm not so sure I do in all aspects. But in the Presentence Investigation Report, there's listed 1988, '89, and '90. Those are calendar years, right?

MR. FRANKEL: Yes, calendar years.

THE COURT: So the taxes not paid in '88 would really have been due on April the 15th of 1989; is that correct?

MR. MARTIN: Yes, Your Honor.

THE COURT: So there was the taxes not paid '88

and this account was opened in December of '88, so it was opened before the first tax date.

MR. FRANKEL: But the corporate fiscal year doesn't run the same as the tax year. The corporate fiscal year ended September 30th.

THE COURT: I want to be sure that the account was opened -- it wasn't opened after the taxes were starting to be evaded, it was opened after the --

MR. FRANKEL: It was opened before --

THE COURT: And April the 15th is when --

MR. FRANKEL: And a knowing decision was made not to declare the income.

THE COURT: All right. Do you have anything?

MR. MARTIN: Your Honor, factually, particularly since it's been stipulated to, I will have to disagree if they are now going to take the position that either of these individuals ever deposited any of these checks off of the Commerce account into other accounts. The government

has no record of that. And the stipulation says contrary to that.

THE COURT: Yes.

MR. MARTIN: Number 2, this Commerce account was the only PF&E account at Commerce Bank; therefore, as long as it's non-interest bearing, unless somebody, in essence, rats them out, there's no way the government would find out about that account. Giving your Federal ID number doesn't expose you to anything if you're not going to earn interest and a 1099 isn't generated.

Moving it to a separate bank means if a subpoena is issued to the Magna Bank and you ask for all accounts of PF&E, because you've moved it to a separate bank, it's not going to be found.

So even if you deposit cash, which they did not deposit all their cash into this account, but even if you do, you know that account is not being looked at unless somebody rats you out. And that's the only way we found

out about this account was because Jody Penn said, hey, by the way, there's also another account.

So, not only the way they opened it, the way they had so much money that didn't earn interest, and the fact that they withdrew all the money in cash clearly shows they were taking significant steps to avoid detection.

And, Judge, we've seen a lot of tax cases in this court and most of them are people simply lie on their form -- not that they take several different methods in order to avoid being caught at the start, but just they decide they don't want to pay it, so they lie on their form. This is far beyond that.

THE COURT: All right.

MR. NOELKER: Your Honor, the 11 accounts I mentioned earlier, there were one or two banks that had -- I know one in particular, Landmark, had two accounts in it. All their accounts otherwise, with the possible exception of one that I don't remember right now, were at separate

banks. That account was opened for the convenience of the bookkeepers who made the deposits. That's why it was opened there. There was no grand plan at that time.

Other than that, I just emphasize what Len Frankel said that these guys did not sit down and try to figure out how the IRS investigated and then evade.

And the evidence – talk about ratting out, the evidence of the account was told the investigators by the bookkeepers; it was given the investigators in documents that they subpoenaed, the non-general ledger documents; and you'll see throughout the presentence reports, and you'll also see in some of the sophisticated means cases, they also look for obstruction of justice. Not only was there no obstruction of justice found in this case, but there was a two-point reduction for acceptance of responsibility. This was not the grand sophisticated scheme that the government is now urging.

THE COURT: But the two-point reduction comes

after the fact.

MR. NOELKER: Right.

MR. MARTIN: Your Honor, at that point, I will have to strongly disagree. Tim Noelker knows we have assumed that these defendants have destroyed numerous records and not turned them over. We have not pursued --

MR. NOELKER: It's wrong and it's improper for him to bring it up.

MR. MARTIN: No. You brought it up, Tim.

THE COURT: That's it, counsel. I don't want to go into anything that's -- the cases that have been brought to the Court's attention, and Mr. Frankel was right, there is no straight line and it is a matter of the Court looking at what is beyond as this one case indicates. It's the Pierce case. It sets out some facts, but it starts out by saying this is not a case of an individual who simply lied on a 1040. If you do that, it's a simple tax evasion and that's not the case, so we have to look at what's beyond that.

Another case that is cited, the Court was talking in the Jagim, J-A-G-I-M, case, that sophistication means to impede discovery of the nature or extent of the offense. That's what they're talking about and then they look a little further as to what was done.

None of the cases that were given to me were so sophisticated that we -- we talked about Cayman Islands or offshore accounts. The question, looking at this, what preponderance? And I'm going to kind of detail this because I want a complete and clear record on it. I've looked at it very carefully, given it a lot of thought, and I've looked at your stipulation. The first thing is I don't agree that it's necessary that somebody knows what the IRS does, and I was not being facetious when I'm not sure what all the IRS does and I'm not sure that anybody does. That's not said in derogation. It's just said because I'm not familiar with all those procedures that they use and that's probably the way it should be. Paying taxes is a very

important aspect of our government. If everybody in the country tomorrow decided to pay no taxes, we would be in one heck of a situation, so I don't think you have to know exactly.

But here we do have a situation, although there were other non-interest bearing accounts, this was one that was set up in the name of the company. I'm familiar with -- it was set up with the Federal ID number I'm familiar with. And it appeared to me that the money came in and was sort of processed through, maybe in a limited way, it was processed through the company.

But then for some reason, maybe it was a separate business, it's been stated, but it was not a different company. I don't know what you mean by separate business because it was all part of the same business and this was a Subchapter S Corporation, but somehow this was taken and put separately in that account.

Now, to separate that because they didn't know how

much it was going to bring -- I can't understand why a company has to -- how it separates funds. They do that by ledgers. They do that by marking book entries of this section of the company. If a company is dealing with three different things, they don't necessarily have to have three different bank accounts.

I am persuaded by the fact that businessmen, for some two or three years, I think that's what you said that account existed, businessmen who are substantial people and have made a lot of money would let $200,000 sit around and not draw interest. Maybe they would do that for two months and maybe if everything that was said, this was not looked at as something that was going to be a bonanza and it was this kind of a business, but it would seem to me that unless there was some other reason, a businessman would say, hey, we're making a lot of money putting it into this account if it was all legitimate and it's not drawing any interest and we're averaging $200,000 in there

and just leaving the interest go by the boards. That doesn't make any sense to me. It shows some other intent.

By not having the interest, no 1099s are generated and that makes the account much more difficult to trace, of course. Then, unlike ordinary businessmen, when I get paid or when other people get paid an amount of money, a thousand or $4,000, this isn't like $200, we go out and usually deposit it or something. These checks were cashed. That's like taking cash to me. If somebody had said, we will only deal with a contractor if they will pay us in cash, to me that rings an alarm. And if somebody says, here, give me the check and I'll run down and cash it as opposed to endorsing the back and mail it to the bank, as you ordinarily would do, that also is extraordinary.

Then it's not on the general ledger. If they're going to figure out what the company is doing and how this new section of the business -- I don't call it a new business -- it should be on the general ledger. It might be in other

records simply because maybe they weren't -- they were just letting the money come in and maybe they weren't that concerned. I don't know.

As I said before, sophisticated means doesn't mean it has to be a good system. It means that it has to be a system pretty much like the cases have said that this was not the case of an individual who simply lied on the form and it was something that was done to impede discovery of the nature and extent of the offense. And I don't say it has to be one that was a good system.

And so I think that, as opposed to that, or the fact that they have other non-bearing accounts, there's no evidence before this Court -- there might be a petty cash fund that doesn't carry enough money, I cannot -- well, there's no evidence that shows that they were -- they're worth hundreds of thousands of dollars not bearing interest. And also the other thing is that it was in the name of the company and it had a Federal ID Number.

I have weighed that carefully, and I did look at that very carefully, because that means the system wasn't very good, but it also meant that when money came in and certain persons of the company like an office manager handled it, it would not ring an alarm bell to that person either, because they were doing it in the name of the company itself as opposed to suddenly if money was coming in and they were sending it to the "XYZ," the money that they were getting was paid for in the name of the company.

If they would have suddenly made an "XYZ" account, then they would have been giving them money for these sales and then suddenly they would have been making out checks out to "XYZ." Who is "XYZ"? That would have also possibly rang an alarm bell in their minds.

So I have weighed all of this. And what weighs more substantially, and which preponderates to me more, was that this was an attempt to go beyond just lying and

evading. It was an attempt set up some type of a means, sophisticated means, is what is used in the guidelines to evade and to impede discovery of the nature and the extent of that offense. To that extent I believe that the two points should be imposed and the objection in that regard will be denied.

Now, let me kind of gather these things together, counsel, if you will. If there's anybody who has anything else that they want me to put on the record in this regard, I think I've covered it as carefully as I can. Again, I want it to be clear so that the record is made if there is any reason to go forward with this at a later time. But those are the basic facts as I see them and the reason why the Court believes that the two points qualify.

I believe the Court has made rulings on all the objections now; is that correct?

MR. FRANKEL: Yes, Your Honor. I think so, yes.

THE COURT: You have the ruling and is it

agreeable with the parties that the Court can adopt as the findings of fact those items in the presentence report which are not objected to and then the rulings that I have made to those that are objected to; is that agreeable?

MR. NOELKER: Yes.

MR. FRANKEL: That's agreeable.

MR. MARTIN: Yes, Your Honor.

THE COURT: All right. That will be the order. And these findings of facts are made for the purpose of sentencing only. It shall not alter the confidentiality of the presentence report. The findings shall not be part of the public record and shall not be disclosed except as prescribed by law or an order of the court.

And with that – then the guidelines for both Mr. Dabbs and Mr. Elton will be as follows: The total offense level will be 11; the criminal history category is 1; months of imprisonment would be from 8 to 14; supervised release term would be 2 to 3 years; fine would be 2,000 to 20,000,

plus possible cost of imprisonment and supervision. There is no restitution as I understand. I believe payments were made; is that correct – there was an amendment?

MR. MARTIN: There have been amended returns filed. Yes, Your Honor.

THE COURT: All right. And then the special assessment would be $50 for each of them.

Are those the proper guidelines?

MR. FRANKEL: That's correct, Judge, based on your rulings.

MR. MARTIN: Yes, Your Honor.

THE COURT: As for the corporation – as you know, Mr. Noelker, there are no proposed guidelines as such, but I would say that going through them the maximum fine is the statutory fine, correct?

MR. NOELKER: Yes, Your Honor.

THE COURT: And is that 250,000?

MR. MARTIN: It is 500,000 for a corporation, Your

Honor.

THE COURT: Is it 500,000 for a corporation? And the special assessment for a corporation is $200, correct?

MR. NOELKER: Yes.

THE COURT: Is that the statutory? Is it 500? Whether it be 250 or 500 is somewhat moot in my mind. For the record, we will put it on correctly. Just one minute. Yes, it is. It's $500,000 maximum fine or five years probation for the corporation. All right.

Now, is there any other aspect as to the determination of the guidelines? You're not waving anything. I'm just saying that's how I find the guidelines and that's how I recite them, based on my findings at least, which you have objected to, and they stay with the record. Are those correct determinations based on my findings?

MR. FRANKEL: It is.

MR. NOELKER: Yes, Your Honor.

MR. MARTIN: Yes, Your Honor.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	No.
	)	4:94CR00256
	)	(ELF)
v.	)	
	)	
PLANT FACILITIES & ENGINEERING, INC., MORLEY D. ELTON, and DAVID D. DABBS,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

This matter is before the Court on the joint motion of defendants Morley D. Elton and David D. Dabbs for release pending appeal. On May 19, 1995, each of these defendants received a sentence that included ten months' imprisonment. They now move the Court, pursuant to 18 U.S.C. §3143(b), to enter an order continuing their bail pending appeal. The government has not filed any

opposition to the motion.

According to 18 U.S.C. §3143(b), the Court shall order that a defendant be detained unless, among other factors, the appeal

> (B) . . . raises a substantial question of law or fact likely to result in –
>
> . . . .
>
> (iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process.

Having reviewed the merits of the defendants' request, the Court will grant their motion.

Accordingly,

IT IS HEREBY ORDERED that the joint motion of defendants Morley D. Elton and David D. Dabbs for release pending appeal is **GRANTED**.

IT IS FURTHER ORDERED that the bond of each defendant shall remain in full force and effect throughout the duration of the appeal process.

Dated this 2nd day of June, 1995.

/s/ Hon. Edward L. Filippine
United States District
Judge

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 95-2414/2415 EMSL

United States of America,	*	
	*	
Appellee,	*	
	*	Order Denying Petition
v.	*	for Rehearing and
	*	Suggestion for
	*	Rehearing En Banc
Morley D. Elton, et al.,	*	
	*	
Appellants.	*	

The suggestion for rehearing en banc is denied.

The petition for rehearing by the panel is also denied.

December 20, 1995

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 95-2414/2415 EMSL

United States of America,	*	
	*	
Appellee,	*	
	*	Appeal from the United
	*	States District Court
v.	*	for the Eastern
	*	District of Missouri
Morley D. Elton, et al.,	*	
	*	
Appellants.	*	

Appellants' motion to stay the mandate of this court is granted pending the filing of a petition for writ of certiorari with the United States Supreme Court.

The issuance of the mandate in this case shall be stayed to and including 2/5/96. If within that time there is filed with the Clerk of this court a certificate of notification by the Clerk of the Supreme Court that a petition for writ of certiorari has been filed, this stay shall continue until final disposition of the case by that court.

January 4, 1996

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit